

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 17-0537

MARJORIE BELL SMITH)
(Mother of TIMOTHY M. BELL, deceased))

Claimant-Petitioner)

v.)

DATE ISSUED: June 13, 2018

SERVICE EMPLOYEES)
INTERNATIONAL, INCORPORATED)

and)

INSURANCE COMPANY OF THE STATE)
OF PENNSYLVANIA)

Employer/Carrier-)
Respondents)

DECISION and ORDER

Appeal of the Decision and Order on Remand and the Decision on Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Marjorie Bell Smith, Mobile, Alabama.

Billy J. Frey (Thomas Quinn, LLP), Houston, Texas, for employer/carrier.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without counsel, appeals the Decision and Order on Remand and the Decision on Motion for Reconsideration (2014-LDA-00460) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). In an appeal by a claimant without legal representation, we will review the administrative law judge's

findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case is before the Board. The underlying facts of the case are undisputed.¹ Claimant is the mother of Timothy Bell, the decedent, who lived with her prior to commencing work for employer in Iraq in 2003. On April 9, 2004, Mr. Bell disappeared after his convoy was attacked. Employer continued to pay Mr. Bell’s salary, which was deposited into an account over which his sister, Felicia Carter, had power-of-attorney until 2009, when a third-party conservator was appointed by the probate court. Claimant and Ms. Carter testified that, at Mr. Bell’s request, claimant regularly received money from her son’s account until 2009.

Mr. Bell was declared dead on April 26, 2010, at which time employer stopped paying his salary. Pursuant to a stipulated compensation order issued by the district director on April 9, 2014, employer paid death benefits to two of decedent’s children for their periods of eligibility. 33 U.S.C. §§902(14), 909(c).

Claimant filed a claim for death benefits as a dependent parent pursuant to Section 9(d), 33 U.S.C. §909(d).² The administrative law judge denied benefits, finding that claimant failed to establish her dependency on decedent under the criteria in Section 152(d) of the Internal Revenue Code, 26 U.S.C. §152(d).

Claimant appealed the denial to the Board, which vacated the administrative law judge’s decision as he applied an incorrect standard to analyze dependency. *Bell Smith v.*

¹ The facts are recounted in more detail in the Board’s first decision. *Bell Smith v. Service Employees Int’l, Inc.*, BRB No. 16-0084 (Aug. 29, 2016).

² Section 9(d) provides, in pertinent part:

If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then ... for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subsection exceed the difference between 66 2/3 per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

Service Employees Int’l, Inc., BRB No. 16-0084 (Aug. 29, 2016). The Board held that the “dependency” of a parent under Section 9(d) of the Act is not determined under Section 152(d) of the Internal Revenue Code. Rather, other family members are entitled to death benefits “if they establish that, at the time of decedent’s death, they were dependent at least in part upon the decedent for the maintenance of their accustomed standard of living.” *Bell Smith*, slip op. at 4 (citing *Urso v. MVM, Inc.*, 44 BRBS 53 (2010)). Thus, the Board remanded the case for the administrative law judge to analyze claimant’s dependency under this standard. The Board also stated that under Section 9(f), 33 U.S.C. §909(f), the issue of claimant’s dependency is determined at “the time of injury” and instructed the administrative law judge to make a definitive determination of when the “time of injury” was for purposes of Section 9(f). *See id.* at 5.

On remand, the administrative law judge found that the date of decedent’s death for purposes of determining dependency was April 9, 2004, when he disappeared. Decision and Order on Remand at 3. The administrative law judge concluded that claimant did not meet her burden of proof to establish that it was more likely than not that she was dependent on her son as of April 9, 2004, such that the termination of his support caused her to change her standard of living. Accordingly, the administrative law judge denied the claim for death benefits. The administrative law judge’s Decision and Order was filed by the district director on April 28, 2017.

Claimant filed a motion for reconsideration on May 12, 2017, which the administrative law judge denied.³ The decision on reconsideration was filed by the district director on May 30, 2017. Claimant filed her appeal on June 29, 2017. Employer filed a response brief. Claimant filed a reply brief.⁴

As a preliminary matter, employer contends that claimant’s appeal should be dismissed as untimely. We acknowledge that claimant’s motion for reconsideration before the administrative law judge could have been found untimely as it was filed more than ten days after the administrative law judge’s Decision and Order on Remand was filed on April 28, 2017.⁵ However, the administrative law judge considered claimant’s motion for

³ Claimant was represented by counsel before the Board and before the administrative law judge on remand. Claimant filed her motion for reconsideration of the administrative law judge’s Decision and Order on Remand without the assistance of counsel.

⁴ Claimant requested an extension of time to file her reply brief under 20 C.F.R. §802.217. The Board grants the motion to enlarge time and accepts claimant’s reply brief.

⁵ 20 C.F.R. §802.206(b) states that a motion for reconsideration must be filed within 10 days from the date the administrative law judge’s decision was filed by the district

reconsideration on the merits before denying it. Therefore, he waived the time limits. *See Hamer v. Neighborhood Housing Svcs. of Chicago*, __ U.S. __, 138 S.Ct. 13 (2017) (holding that a time limit not proscribed by statute may be waived or forfeited); *Bowman v. Lopereno*, 311 U.S. 262 (1940) (holding that if a court considers an untimely petition for rehearing on the merits, the time for appeal runs from the date of the rehearing order). Accordingly, we deem the time for filing the notice of appeal to have been tolled until May 30, 2017, when the administrative law judge's decision denying the motion for reconsideration was filed by the district director. Because claimant's appeal was filed within 30 days of that date, we therefore address it. 20 C.F.R. §802.206(e).

In an appeal by a claimant unrepresented by counsel, the Board addresses all findings adverse to the claimant. *See, e.g., Wilson v. Boeing Co.*, __ BRBS __, BRB No. 17-0577 (Apr. 5, 2018). We begin with the administrative law judge's determination that the date of injury for purposes of Section 9(f) is April 9, 2004. The administrative law judge noted that claimant stipulated that decedent was declared dead by the Department of the Army as of April 26, 2010 but found that there was no agreement between the parties that the stipulation applied for the purposes of a dependency determination. Decision and Order on Remand at 2. The administrative law judge acknowledged the possibility that claimant survived beyond the ambush on April 9, 2004 but concluded that it is most likely that he was killed on that date. *Id.* at 3. He concluded, therefore, that the date of injury for dependency purposes was April 9, 2004. *See id.*

Section 9(f) states that “[a]ll questions of dependency shall be determined as of the time of the injury.” 33 U.S.C. §909(f). In *Henderson v. Kiewit Shea*, 39 BRBS 119, 123 (2006), the Board held that in cases when the death is not coincidental with the injury, “an individual must establish his or her dependency at the time of the work-related death.” In its initial decision, the Board stated that the administrative law judge has the discretion to infer an earlier date of death than the date used by the Department of the Army under the circumstances of this case. *Bell Smith*, slip op. at 5. The administrative law judge as the fact-finder is charged with making reasonable inferences from the evidence in the record. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016). We affirm the administrative law judge's conclusion that the date of injury for purposes of Section 9(f) is April 9, 2004 as it is rational based on the circumstances of decedent's disappearance in the attack. Thus, claimant had to establish her dependency on decedent as of this date.

Section 9 provides death benefits to certain survivors where a work-related injury causes an employee's death. Section 9(d) provides that if there is no surviving spouse or

director. Under 20 C.F.R. §802.206(a), a timely motion for reconsideration suspends the running of time for filing an appeal.

child or if the amount payable to the surviving spouse or child is less than 66 and 2/3 percent of the decedent's average wage,⁶ then benefits may be paid to certain other family members, provided they were dependent on the decedent. 33 U.S.C. § 909(d); *Urso*, 44 BRBS at 56. "Dependency" under the Act is given its common meaning, i.e., "not self-sustaining," "relying on for support," or "helping to maintain the dependent in [her] customary standard of living." *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397, 399 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Texas Employers' Ins. Ass'n v. Shea*, 410 F.2d 56 (5th Cir. 1969); *Standard Dredging Corp. v. Henderson*, 150 F.2d 78, 80 (5th Cir. 1945); *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985). A claimant's partial dependency is sufficient. *Urso*, 44 BRBS at 56. The test is whether the contributions were needed and relied upon to maintain the alleged dependent in the position in life to which she was accustomed. *Texas Employers' Ins. Ass'n v. Sheppard*, 62 F.2d 122 (5th Cir. 1932); *L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008). A claimant's credible testimony regarding decedent's level of financial support may constitute sufficient evidence of dependency. *Angelle v. Steen Prod. Service, Inc.*, 34 BRBS 157 (2000).

Claimant testified that before he left for Iraq, decedent lived with her and contributed to her household expenses. Claimant testified that she relied on the funds provided by decedent, estimating that he paid between \$300 and \$500 per month. Tr. at 48-50. Ms. Carter testified that before he left to go overseas decedent asked her to give claimant \$2,000 a month and make sure she had what she needed. CX 6 at 22-25. However, the administrative law judge found that neither claimant nor Ms. Carter was very credible because of the inconsistencies and contradictions in their testimonies. *See* Decision and Order on Remand at 4;⁷ *see also* Decision and Order at 15-16 (Oct. 2, 2015). The administrative law judge considered the documentary evidence in the record,

⁶ Employer paid death benefits to decedent's daughter from April 27, 2010 to December 12, 2011, and to one of his sons from April 27, 2010 to February 27, 2015. Each child received 33 1/3 percent of the decedent's average weekly wage until the termination of the daughter's benefits, at which time the son began receiving 50 percent of the decedent's average weekly wage.

⁷ The administrative law judge noted that claimant gave inconsistent answers concerning the amount of money she allegedly received from decedent when she was asked to explain why she told the probate court she had received \$30,000. Claimant did not recall how Ms. Carter came to have decedent's power of attorney, although Ms. Carter testified claimant signed the document. Ms. Carter "demonstrated a remarkable failure to recall much about what [c]laimant alleged in the probate petition or her role in the litigation." Decision and Order on Remand at 4; Decision and Order at 15-16 (Oct. 2, 2015). The administrative law judge found that the inconsistencies and contradictions could not be explained merely by the passage of time. Decision and Order on Remand at 4.

consisting of three checks from decedent payable to claimant, for \$444 in April 1998, \$5,000 in October 2000, and \$4,000 in November 2003, but found them insufficient to establish claimant's dependency on decedent.⁸ *See id.* In his initial decision, the administrative law judge noted that no other financial records were offered into evidence. The administrative law judge also noted that decedent stated he had no dependents for purposes of his group life insurance and indicated that his beneficiaries were his sister and his son; his mother was not listed as a beneficiary. EXs 5, 6. The administrative law judge concluded that claimant did not meet her burden of proof to establish dependence on the decedent as of the date of his death and therefore denied the claim for death benefits. Decision and Order on Remand at 4.

We reject claimant's assertion that the administrative law judge erred in weighing the evidence concerning her dependency. The Board is not empowered to reweigh the evidence but may assess only whether there is substantial evidence to support the administrative law judge's decision. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and draw his own conclusions from that evidence. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge was well within his discretion to determine that claimant's testimony and that of decedent's sister was inconsistent and unreliable and therefore insufficient to establish dependency. *Meeks*, 819 F.3d at 129, 50 BRBS at 37(CRT). The administrative law judge's finding is also supported by decedent's life insurance documents. EXs 5, 6. Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant did not meet her burden of proof to establish her dependency on decedent at the time of his death. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

Claimant cites *Fisher v. Halliburton*, 390 F. Supp. 2d 610 (S.D. Tex. 2005), a case in which she was involved "Individually and as Successor in Interest to Decedent Timothy Bell," in support of her claim of dependency.⁹ Claimant raised this case to the

⁸ In her reply brief to the Board, claimant also submitted copies of two additional canceled checks from decedent to claimant, dated February 13, 2004 and March 17, 2004. These two checks were not offered into evidence before the administrative law judge and thus cannot be considered by the Board. 20 C.F.R. §802.301(b). Claimant may file a motion for modification based on a mistake of fact concerning her dependency under Section 22 of the Act within one year of the Board's decision and submit additional evidence at that time. 33 U.S.C. §922.

⁹ The case involved tort claims by a number of Halliburton employees or their family members, including claimant, alleging, among other things, fraud and negligence on the part of the defendants resulting in the injuries and deaths to the employees. The District

administrative law judge on reconsideration and the administrative law judge stated that the case “had nothing to do with the basis for the denial of her claim.” Decision on Motion for Reconsideration at 3. The administrative law judge correctly stated that *Fisher* is irrelevant to the question of whether claimant qualifies as decedent’s dependent for purposes of Section 9(d) of the Act. Therefore, we reject claimant’s contentions that the administrative law judge erred and we affirm the denial of death benefits.

Accordingly, the administrative law judge’s Decision and Order on Remand and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

Court denied the defendants’ motion to dismiss, but the decision was vacated by *Fisher v. Halliburton*, 667 F.3d 602, 45 BRBS 95(CRT) (5th Cir.), *cert. denied*, 568 U.S. 941 (2012), in which the Fifth Circuit dismissed the plaintiffs’ tort claims as being preempted by the Defense Base Act.